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Supreme Court, U.S.
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NO. 85-18
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1985

PITTSBURGH TERMINAL CORPORATION,

Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, W. JAMES PRICE, ALONZO G. DECKER, JR., JAMES PARKER NOLAN, FREDERICK DEANE, JR., JAMES L. O'KEEFE, GREGORY S. DeVINE, FAY A. LeFEVRE, JOHN K. STEVENSON, HAYS T. WATKINS and HOWARD E. SIMPSON; THE CHESAPEAKE AND OHIO RAILROAD and THE CHESSIE SYSTEM, INC.,

Respondents.

MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER,

Petitioners,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, W. JAMES PRICE, ALONZO G. DECKER, JR., JAMES PARKER NOLAN, FREDERICK DEANE, JR., JAMES L. O'KEEFE, GREGORY S. DeVINE, FAY A. LeFEVRE, JOHN K. STEVENSON, HAYS T. WATKINS, and HOWARD E. SIMPSON; THE CHESAPEAKE AND OHIO RAILROAD and THE CHESSIE SYSTEM, INC.,

Respondents.

SUPPLEMENTAL APPENDIX TO THE PETITIONER-PLAINTIFFS' PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT TO DEMONSTRATE THAT EACH ISSUE RAISED IN THE PETITION WAS ALSO EXPLICITLY RAISED IN THE COURTS BELOW

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DESIGNATION OF PORTIONS OF THE RECORD TO DEMONSTRATE THAT EACH ISSUE RAISED IN THE PETITION WAS ALSO EXPLICITLY RAISED IN THE COURTS BELOW

Petitioner-Plaintiffs, Pittsburgh Terminal Corporation, et al., in this Supplemental Appendix to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit have designated and included portions of the record to demonstrate that each issue raised in the Petition was properly raised in the Courts below.

This Supplemental Appendix is filed in response to the Respondent-Defendants' Brief in Opposition which erroneously states that none of the three issues raised by the Petition were raised below. See Respondents' Brief in Opposition, pp. 9 and 11. Respondents' Brief claims that "The

only issues raised by the Petition for Certiorari are issues which had never been raised below." p. 6. Respondents' statement is refutted by the record in this case.

Petitioners' Petition presents three questions for review by this Honorable Court:

> I. Whether the purposes of the federal securities law enforcement scheme was defeated by court holdings which deny both defrauded debenture-holders who subsequently sell and those who bought from them relief in a Sec. 10(b) action?
>
> II. Whether judicial consideration of an offer of judgment in determining the damages to be awarded violates Federal Rule of Civil Procedure 68?
>
> III. Whether judicial consideration of a Rule 68 offer of judgment to deny plaintiffs pre-judgment interest violates the RULES ENABLING ACT?

I. Question I Was Raised in the Courts Below

In their Brief Respondents state that the first issue raised [i.e., whether Petitioners as wronged B&O debentureholders who sold some of their debentures during the prolonged litigation have a statutory right to a remedy with respect to those debentures] was not raised in the Courts below. (Respondents' Brief in Opposition, p. 9). This is an error because:

A. Before judgment and in connection with urging an appropriate remedy in this case Petitioners filed an Affidavit in the District Court on October 20, 1983 (shortly after they sold their debentures) stating that they had sold some of their debentures during the pendency of the litigation (Supp. App. 9a-10a).

B. Petitioners submitted a brief in the District Court arguing in opposition to Respondents' proposed remedy that "all Plaintiffs except PTC . . . have sold a number of their debentures and would, therefore, not receive any remedy as to the debentures sold, under Defendants' new remedy proposal" (Supp. App. 12a n. 17).

C. Petitioners as Appellants thereafter filed a brief in the Court of Appeals in which they devoted one entire section of their Brief to the statutory assignment issue raised in their Petition arguing that "The Trial Court erred when it failed to award Plaintiffs any remedy on the debentures they owned on December 13, 1977 and subsequently sold" (Supp. App. 14a-18a). An entire separate

section of this Brief was devoted to the issue of whether debenture sellers were entitled to recover under the Parties' stipulation.

D. Petitioners also filed a reply brief in the Court of Appeals explicitly directed to this statutory assignment issue (Supp. App. 26a-28a).

E. Petitioners thereafter filed a petition for rehearing and/or rehearing in banc in the Court of Appeals in which they again clearly raised this statutory issue (Supp. App. 35a-41a).

II. Questions II and III Were Raised in the Court Below

Respondents erroneously state that this Court should not consider the two Fed.R.Civ.P. 68 issues solely because the Petitioners did not object

to the Court of Appeals' consideration of the Offer of Judgment in connection with denying Petitioners pre-judgment interest. (Brief in Opposition, p. 11). This is clearly inaccurate since the record demonstrates that:

A. The District Court did not consider the Offer of Judgment when it denied Petitioners pre-judgment interest since their Offer of Judgment had not been filed as of the date of the District Court's May 8, 1984 order denying pre-judgment interest;

B. The issue of denying Petitioners' prejudgment interest because of the Offer of Judgment was first raised by Respondents in their Brief as Appellees to the Court of Appeals;

C. Petitioners immediately thereafter argued in their reply brief to the Court of Appeals (after the issue was raised for the first time on appeal by the Appellees in their Brief) that the District Court had not provided any reason for the justification of the denial of prejudgment interest and that the offer of judgment could not possibly have been the basis of the denial since it was filed after the District Court rendered its opinion (Supp. App. 22a-25a); and

D. After the Court of Appeals found that the denial of pre-judgment interest by the District Court was proper solely because of the Offer of Judgment, Petitioners filed a petition for rehearing or

rehearing in banc in which they specifically challenged the Court of Appeals' reliance on the Offer of Judgment as a basis for denying pre-judgment interest as violating both Rule 68 and the Rules Enabling Act (Supp. App. 42a-45a).

For the reasons set forth above Defendant-Respondents therefore err when they state that the questions raised in the Petition were not raised in the Courts below.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

PITTSBURGH TERMINAL CORPORATION, Plaintiff, vs. THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Defendants.	)	CIV. ACT. NO. 77-1455
MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER, Plaintiffs, vs. THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Defendants.	)	CIV. ACT. NO. 79-94

AFFIDAVIT OF MONROE GUTTMANN

COMMONWEALTH OF PENNSYLVANIA:
: SS:
COUNTY OF ALLEGHENY :

Monroe Guttmann, being duly sworn, deposes and says that:

I. STATUS OF AFFIANT

1. I am the President and principal shareholder of Pittsburgh Terminal

Corporation ["PTC"], Plaintiff in Civil Action No. 77-1455 (W.D.Pa.) and one of the Plaintiffs in Civil Action No. 79-94 (W.D.Pa.) along with Loretta Guttmann, Janet Rees and Evelyn Bittner.

2. Loretta Guttmann, Janet Rees and I have sold some of our debentures which we acquired prior to December 13, 1977 in reliance on the Defendants' affidavit (App. 188a) that those who held debentures on December 13, 1977 would be entitled to receive the remedy awarded by the Court or received in settlement in the Civil Action Nos. 79-94 and 77-1455 (W.D.Pa.).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

PITTSBURGH TERMINAL CORPORATION, Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 77-1455
THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Defendants.	)	

MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER, Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 79-94
THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' VERIFIED MOTION FOR PERMISSION TO TAKE DISCOVERY OR ALTERNATIVELY TO AWARD MONEY DAMAGES ON THE EXISTING RECORD

V. DEFENDANTS ERR WHEN THEY ARGUE RESCISSION IS THE ONLY REMEDY AVAILABLE TO PLAINTIFFS

Defendants' legal position is that a victim of fraud may only rescind the transaction when the security is still available. Defendants' Brief, pp. 8 and 11. Plaintiffs disagree.[17] Da-

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[17] Defendants' position that Plaintiffs are only entitled to unregistered MAC stock upon conversion, is inconsistent with their prior representation in their June 29, 1983 Response to Plaintiffs' Verified Motion For Permission To Take Discovery that Plaintiffs "whether or not they sell their Debentures . . . will still be entitled to any relief given by this Court in accordance with the agreement made by the B&O with the Trustee for the Debentures." (Para. 6) (PTC Docket Entry 232). Moreover, it should be noted that all Plaintiffs except PTC (and presumably a number of other debenture holders who held on December 13, 1977) have sold a number of their debentures and would, therefore, not receive any remedy as to the debentures sold, under Defendants' new remedy proposal.

mages are always available to a victim under Section 10(b) of the Securities Act.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 84-3331 AND 84-3332

PITTSBURGH TERMINAL CORPORATION,
APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et. al.,
APPELLEES.

(D.C. Civil No. 77-1455)

MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES and EVELYN BITTNER,
APPELLANTS,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.,
APPELLEES.

(D.C.Civil No. 79-0094)

On Appeal From The United States District Court For The Western District Of Pennsylvania At Nos. 77-1455 And 79-0094 From Order Of May 8, 1984

BRIEF OF APPELLANTS, PITTSBURGH TERMINAL CORPORATION, MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES AND EVELYN BITTNER

IV. The Trial Court Erred When It Held That Plaintiffs And Other Similarly Situated Debentureholders Who Owned Their Debentures On December 13, 1977 And Subsequently Sold Were Not Entitled To Any Remedy

A. The Trial Court erred when it failed to award Plaintiffs any remedy on the debentures they owned on December 13, 1977 and subsequently sold

The Trial Court erred when it failed to award Plaintiffs any remedy on those debentures Plaintiffs owned on December 13, 1977 (369a) and subsequently sold (567a-568a). This part of the Trial Court's May 8, 1984 order is inconsistent with the mandate of this Court in Pittsburgh Terminal Corporation, 680 F.2d at 943 to award an "appropriate remedy". No remedy is not an appropriate remedy.

Plaintiffs were injured, and they are entitled to be compensated

for that injury. Plaintiffs' debentures became "less valuable". See Pittsburgh Terminal Corporation, 680 F.2d at 945, where Judge Garth concurring stated:

> Here, the convertible debentureholders claim that the value of the non-rail assets of the B&O which are represented by the MAC dividend roughly approximates $250 million. Prior to the declaration of the MAC dividend, the debentures included the right to convert to B&O common stock which represented both rail and non-rail assets; after the dividend declaration, the debentures were convertible into B&O common stock which no longer represented the non-rail assets and only represented the rail assets. (Emphasis in original) Id. at 945.

Judge Adams dissenting on other grounds in Pittsburgh Terminal Corporation agreed that Plaintiffs had been damaged as follows:

> Nor do I take issue with Judge Garth's determination that the debentures were less valuable after the declaration of the dividend. Id. at 953.

This Court in banc in Lowry, 707 F.2d 721 (3d Cir. 1983) agreed that Plaintiffs had been damaged:

> In a separate action, the debentureholders sued under the Securities Exchange Act of 1934 claiming that, as to them, the dividend declaration was fraudulent. They argued that the value of their conversion option, and hence of their convertible debentures, would be reduced unless they were allowed to convert in time to qualify for the Mid-Allegheny dividend. This Court agreed, . . . (Emphasis added) Id. at 722[30]

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[30] As Judges Aldisert and Hunter recognized in Lowry:

> "Because the B&O debentures were of considerably less value after the declaration of the MAC dividend Judge Garth has concluded that the declaration of the dividend is an action which clearly 'relates to' that class of securities." (Emphasis added) 707 F.2d at 733.

Plaintiffs' conversion interest into the B&O that consisted of both rail and substantial non-rail assets were silently transferred by and to B&O's parent the C&O and Chessie [now CSX]. As seen above this Court in two separate opinions has recognized that Plaintiffs' conversion interests were wrongfully damaged on December 13, 1977 and that Plaintiffs were entitled to an appropriate remedy for that damage. The Trial Court erred when it failed to award Plaintiffs any remedy for the debentures they owned on December 13, 1977 and subsequently sold.

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(D.C.Civil No. 79-0094)

On Appeal From The United States District Court For The Western District Of Pennsylvania At Nos. 77-1455 and 79-0094 From Order Of May 8, 1984

REPLY BRIEF OF APPELLANTS, PITTSBURGH TERMINAL CORPORATION, MONROE GUTTMANN, LORETTA GUTTMANN, JANET REES AND EVELYN BITTNER

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO AWARD INTEREST ON THE AMOUNT OF THE B&O NET DIVIDENDS AWARDED

Assuming arguendo that an award of the right to obtain unvalued MAC stock upon conversion is an appropriate remedy instead of damages, the District Court erred in not awarding interest on the net loss of B&O dividends since 1977. See generally Plaintiffs' Brief, pp. 44-48.

The Parties can only speculate as to why the District Court failed to award interest since its opinion does not provide any reasoning on this issue. Here it "cannot [be said] that the [District Court's] exercise of discretion was based upon a correct legal premise. . . [L]egal error infected

the ruling." Fuentes v. Reilly, 590 F.2d 509, 513 (3d Cir. 1979).[18]

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[18] In Blau v. Lamb, 363 F.2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002 (1967) and in the other cases cited by Defendants (See, e.g., Defendants' Brief, p. 41) the Courts recognized that a pre-judgment interest damage award could be denied where a Trial Court expressly finds "its exaction would be inequitable." Blau v. Lehman, 368 U.S. 403, 414 (1962) quoting Board of Commissioners vs. United States, 308 U.S. 343, 352 (1939). In this Section 10(b) fraud case the Trial Court did not find its exaction from Defendants would be inequitable.

A. The Relief Granted To Plaintiffs Was Not The Same Or Less Than That Tendered In Defendants' Offer Of Judgment

Defendants speculate that "the decision of the District Court not to award interest on that difference [between the MAC dividends and debenture interest] was proper because . . . defendants' Offer of Judgment on February 12, 1979 . . . offered the very relief awarded by the Trial Court over five years later." Defendants' Brief, p. 7.[19]

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[19] Defendants' offer of judgment was not filed until August 3, 1984 (Defendants' Brief, p. 40 n. 24) while the District Court's opinion denying interest was rendered more than two months earlier on May 8, 1984. The Defendants' offer, unknown to the District Court, therefore could not have formed the basis for its decision to deny interest.

Therefore it is argued that Plaintiffs were not diligent in pursuing this action and the "equities favor" Defendants. Defendants' Brief, pp. 38-40.

Plaintiffs, however, obtained in litigation substantially more relief than Defendants offered in February, 1979.

Plaintiffs at all times in this litigation have been seeking a remedy for all debentureholders. For example in Mr. Guttmann's initial complaint filed on January 22, 1979 he claimed relief for "Plaintiffs and all other debentureholders" (Emphasis added) (74a-75a). While Plaintiffs were not permitted to represent a class of debentureholders under Rule 23, they attempted to and were able to

obtain a substantial benefit for other debentureholders by not accepting Defendants' February, 1979 offer of judgment which was limited to Plaintiffs. See, e.g., Defendants' May 2, 1980 stipulation which will result in a large number of other debentureholders receiving relief. (82a).

In addition the offer of judgment did not provide for registration. As a result of this litigation and more specifically this appeal, even if the MAC stock option remedy is approved, the Plaintiffs and other debentureholders will receive registered MAC stock. See Defendants' recent concession at pp. 18-19 of their Brief agreeing to register the MAC stock at CSX Re-

sources expense. As admitted by Defendants "registration would enhance the attractiveness and marketability of the MAC stock." Id. [20]

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[20] Even with the MAC stock registration issue resolved, remaining problems with a stock remedy include determining appropriate restitution to compensate debentureholders for the possible decrease in value of MAC over the last six years, the date when the MAC stock will be registered and available for distribution, whether conversion to B&O stock is a necessary remedy prerequisite, whether Plaintiffs will be entitled to receive the MAC registration statement before being required to convert (if conversion is necessary), and an appropriate remedy for debentureholders who owned debentures on December 13, 1977 and subsequently sold, etc., etc.

IV. THE DISTRICT COURT ERRED WHEN IT HELD THAT PLAINTIFFS AND OTHER SIMILARLY SITUATED DEBENTURE-HOLDERS WHO OWNED THEIR DEBENTURES ON DECEMBER 13, 1977 AND SUBSEQUENTLY SOLD THEM WERE NOT ENTITLED TO ANY REMEDY

A. The District Court Erred When It Refused To Award Plaintiffs Any Remedy On The Debentures They Owned On December 13, 1977 And Subsequently Sold

Plaintiffs sold some of the debentures following this Court's remand. Plaintiffs' Brief, pp. 48-50. The District Court misinterpreted this Court's "appropriate remedy" mandate when it refused to award any remedy as to debentures Plaintiffs held on December 13, 1977 and subsequently sold.

In PTC, 680 F.2d 933 (3d Cir. 1982) this Court held that a federal cause of action under Section 10(b) inured to the benefit of convertible debentureholders who held those debentures on December 13, 1977.

Thereafter in Lowry, 707 F.2d 721 (3d Cir. 1983) (en banc), this Court held that, in the absence of an express assignment, debentureholders as of December 13, 1977 and not the subsequent purchasers of the debentures had standing to pursue the federal claims under Section 10(b). Judge Garth and Judge Sloviter, concurring in Lowry, stated:

> When the B&O refused to notify its convertible debentureholders of the MAC dividend on December 13, 1977, it was the persons holding convertible debentures on that date - not subsequent purchasers of those debentures - who were deprived of the opportunity to obtain the MAC dividend. . . . Any sale by the debentureholders under such circumstances could not pass the loss onto a subsequent purchaser as the loss would already have been realized by the original debentureholders when less was received from the sale of the debenture than would

> have been received in the absence of the MAC dividend declaration.[23] Id. at 729.

Therefore, under Lowry, Plaintiffs as of December 13, 1977 who subsequently sold some of the debentures were entitled to relief under Section 10b-5 in order to "make good the wrong done." Bell v. Hood, 327 U.S. 678, 684 (1946).

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[23] Judge Adams also joined in this opinion. Id. at 732. Compare the positions of Seitz and Becker, JJ. dissenting in Lowry but noting that their legal position did not address the situation where "the seller had brought an action on the claim before the sale and that claim was still pending at the time of the sale." Id. at 747 n. 4. Here, Plaintiffs' claims were pending at the time of sale.

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(D.C. Civil No. 79-0094)

On Appeal From The United States District Court For The Western District of Pennsylvania At Nos. 77-1455 and 79-0094 From Order Of May 8, 1984

PETITION FOR REHEARING AND/OR REHEARING IN BANC

PETITION FOR REHEARING AND/OR REHEARING IN BANC

I. INTRODUCTION

By Memorandum Opinion dated February 28, 1985, a Panel of this Court consisting of Judge Hunter, District Court Judge Kelly and Judge Higginbotham dissenting in part, affirmed the remedy awarded by the Trial Court following remand by this Court which had found a violation of Section 10(b) of the Securities and Exchange Act. Pittsburgh Terminal Corp. v. Baltimore & Ohio Ry., 680 F.2d 933 (3d Cir. 1982), cert. denied, 459 U.S. 1056 (1982).

While failing to address the issue directly, the Panel's Opinion sub-silentio resolved the assignment question which split this Court in banc 3-3 in Lowry v. Baltimore & Ohio

Railroad Co., 707 F.2d 721 (3d Cir. 1983), 711 F.2d 120 (3d Cir. 1983), cert. denied, 104 S.Ct. 238 (1983), since it declined to provide any remedy at all to persons, including the Plaintiffs, who had held their debentures on December 13, 1977, but sold them during the pendency of this prolonged litigation. In order to finally resolve the issue of whether defrauded securities holders may maintain their cause of action after sale of the underlying securities, this Court should review the Panel's opinion denying any relief to wronged holders who sold their debentures.

The second issue of exceptional importance presented by the Panel's affirmance is whether a court has

the power to create a judicial exception to the registration requirements in the Securities Act. The Trial Court's order in this case held that Defendants could offer MAC stock to the Plaintiffs and other debentureholders without a registration statement having been filed and in the absence of a statutory exemption. (546a-547a) Such an offering deprives Plaintiffs of the investment safeguards mandated by 15 U.S.C. §77 (l)(c). Although Defendants conceded on appeal that the Trial Court's Order should be amended to provide that the Plaintiffs receive, prior to their decision to convert, a registration statement for the MAC stock, the Panel declined to so order.

Plaintiffs are left with an award offering them and others non-exempt unregistered stock.

A third issue is presented by the Panel's completely unprecedented reliance on an offer of judgment, filed after the appeal in this case, as a basis for denying Plaintiffs pre-judgment interest. Consideration of the offer of judgment for the first time on appeal to deny Plaintiffs' claim of substantive entitlement to pre-judgment interest violated both the plain language of Fed.R.Civ.P. 68 and the prohibition in the Rules Enabling Act, 28 U.S.C. §2072, against using the rules to limit substantive rights. A similar issue is now pending before the United States Supreme Court.

Plaintiffs submit that each of the three issues discussed above provides a sufficient and independent basis for the Court to review in banc the Panel's February 28, 1985 memorandum opinion.[1]

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[1] REQUIRED STATEMENT BY COUNSEL

I, Michael P. Malakoff, express a belief, based on a reasoned and studied professional judgment, that the Panel's February 28, 1985 split decision is contrary to decisions of this Court and the Supreme Court and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. The Panel's decision presents questions of exceptional importance, to-wit, whether the Panel's split decision is contrary to Pittsburgh Terminal Corp., supra; Lowry, supra; 15 U.S.C. §77(1)(c); Fed.R.Civ.P. 68 and Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), cert. granted, 104 S.Ct. 2149 (April 23, 1984).

II. QUESTIONS PRESENTED FOR REVIEW

A. Whether the Panel Erred when It Decided Sub-Silentio that Defrauded Holders Who Subsequently Sell Their Debentures Are Not Entitled to a Federal Remedy

By Affidavit dated October 19, 1983 Plaintiff Monroe Guttmann advised the Trial Court that he and Plaintiffs Loretta Guttmann and Janet Rees had all sold some of the debentures which they had held on December 13, 1977 (369a).

The Trial Court in its May 8, 1984 Order specifically held that its remedy was limited to those persons who owned the debentures on December 13, 1977 and still owned them and those persons who owned the debentures on December 13, 1977 and subsequently converted to B&O common stock (567a-568a). Despite the

Guttmann Affidavit, the Trial Court stated that "persons who owned B&O debentures on December 13, 1977 and subsequently sold their debentures are not within the scope of either this action or Lowry." (568a)

The Panel affirmed the denial of any remedy at all to Plaintiffs as to the debentures which they had sold. While stating that its decision did not "decide whether those persons [including Plaintiffs who held on December 13, 1977 but subsequently sold] have a cause of action against B&O" (Op. p. 6, n. 2) the Panel actually found that Plaintiffs were not entitled to any federal remedy since it upheld the Trial Court's denial of any remedy to the

three Plaintiffs before it who had sold their debentures.[2]

The Panel then proceeded, over Judge Higginbotham's dissent, to deny a remedy to all of the other defrauded debentureholders who sold.[3]

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[2]Judge Hunter who wrote the Panel's opinion never believed that the Plaintiffs had a cause of action with respect to any of their debentures. He concurred in the result in Lowry solely on the basis that the opinion in Pittsburgh Terminal Corp. should be overruled. 707 F.2d at 732-34. The Panel interpreted the "appropriate remedy" mandate of Pittsburgh Terminal Corp., 680 F.2d 943 to be no remedy for Plaintiffs as defrauded debenture sellers.

[3]A number of remedies were available to the Plaintiffs and the other defrauded debentureholders. As to remedy Judge Higginbothan, in his dissent, suggested that an opportunity to purchase substitute debentures and tender them for a remedy may be appropriate. Slip Op. p. 5. Accord Chris Craft

(Footnote continued on following page)

1. The Panel's Opinion Conflicts with the Position of Five of the Eight Judges of This Court Who Sat In Banc in Lowry

In Lowry, this Court in banc in a per curiam opinion held that purchasers did not acquire statutory §10(b) claims when they purchased securities from a defrauded seller. As to the defrauded sellers, three members of this Court stated that they would retain their §10(B) cause of action. Judges Garth

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[3] (Footnote continued from preceding page)

Industries v. Piper Aircraft, 480 F.2d 341, 391 (2d Cir. 1973), rev'd on other grounds, 430 U.S. 1 (1977). Alternatively the Panel could have ordered an accounting, as requested by Plaintiffs (277a; 453a). See Glick v. Campagna, 613 F.2d 31 (3d Cir. 1979) ("an accounting [could have provided] the parties an adequate opportunity to develop their position." Id. at 38).

and Sloviter, concurring in Lowry, stated:

> In this light, absent any express assignment of a cause of action to the subsequent purchasers, it would be unjust and inconsistent with the remedial purposes of the securities laws to strip the right to recover from the convertible debentureholders who were actually injured, and grant it instead to subsequent purchasers who sustained no injury or loss from the Rule 10b-5 violation. Id. at 729.

Judge Adams also joined in this statement. Id. at 732.

Two other judges of this Court (Seitz and Becker, J.J.) recognized that defrauded sellers may retain their §10(b) cause of action if, as here, they had an action pending on the claim at the time of the sale. 707 F.2d at 747 n. 4.

Therefore five members of this Court appear to believe that de-

frauded sellers who file actions on their §10(b) claims are entitled to a federal remedy even if they subsequently sell their securities - three judges expressly and two judges by implication.[4]

If the Panel's Opinion is correct in denying a cause of action to Plaintiffs solely because they sold their debentures, then Defendants in this case receive a windfall from the litigation because neither the debenture purchasers nor the debenture sellers have a cause of ction. Defendants receive the benefit of prolonged litigation where only plaintiffs who

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[4]Two other members of this Court in banc in Lowry (Aldisert and Hunter, J.J.) did not reach the assignment issue and one member of the Court (Gibbons, J.) held that assignment was automatic. Judges Higgenbotham and Weis had recused themselves.

can hold on to their securities throughout the entire course of the litigation will receive a remedy.[5]

This case presents the opportunity for this Court to decide the question left unresolved by Lowry as to whether defrauded sellers retain their §10(b) cause of action after they sell their securities. The Panel's Opinion, which avoids the issue by ignoring the claims asserted by the Plaintiffs, should be reviewed.

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[5] It is believed, after a review of the Bank & Quotation Record of B&O debenture sellers on the New York Stock Exchange, that a large percentage of the debentureholders as of December 13, 1977 have sold their debentures and will be deprived by any remedy under the Panel Opinion.

C. Whether the Panel's Conclusion that an Offer of Judgment May Be Considered in Determining the Amount of Damages to Be Awarded Violates Rule 68 and the Rules Enabling Act

Although the Defendants' offer of judgment was not filed by Defendants until after the Trial Court rendered its May 4, 1984 Opinion denying pre-judgment interest, the Panel considered the offer of judgment, determined that it offered Plaintiffs all the relief which they ultimately obtained from Defendants and used that as the sole basis for sustaining the Trial Court's refusal to award pre-judgment interest. The Panel's use of an offer of judgment in a proceeding, other than for a determination of liability for costs, violated Fed.R.Civ.P. 68 and con-

stituted an unlawful abridgment of Plaintiffs' substantive rights.

Fed.R.Civ.P. 68 provides that an offer of judgment "is not admissible except in a proceeding to determine costs." Consideration of Defendants' offer of judgment by the Panel on the issue of whether plaintiffs were entitled to pre-judgment interest as a part of their damages remedy violated the plain language of that Rule.

The Panel's conclusion that the offer of judgment could be considered in determining the remedy owed Plaintiffs also violated the Rules Enabling Act, 28 U.S.C. §2072 that prohibits the abridgment of a substitute right by the Federal Rules. Entitlement to pre-judgment interest is a matter of

substantive right. It is not a procedural question.

To allow the right to pre-judgment interest to be abrogated by a plaintiff's refusal of an offer of judgment allows the impermissible abridgment of a substantive right by a Rule which is prohibited by the Enabling Act 28 U.S.C. §2072. Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), cert. granted, 104 S.Ct. 2149 (April 23, 1984). The Panel appeared unaware that its opinion conflicted with Fed. R.Civ.P. 68 and Chesny, or that a similar issue was currently pending before the Supreme Court.

This Court should review the Panel's rationale for the Trial Court's denial of pre-judgment in-

terest since that rationale requires consideration of the offer of judgment in a manner proscribed by Fed.R.Civ.P. 68 and the Rules Enabling Act.

CERTIFICATE OF SERVICE

The undersigned, who is a member of the Bar of this Court, hereby certifies that three copies of the within Supplemental Appendix to the Petitioner-Plaintiffs' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to Demonstrate that Each Issue Raised in the Petition Was also Explicitly Raised in the Courts Below was served upon the following individuals at the addresses shown below by first class United States Mail, postage prepaid on October 11, 1985:

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